Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

Dr. Carlito Axibal **Petitioner**

Oksana Axibal **Respondent**

On Petition for Writ of Certiorari to the United States Supreme Court

Petition for Writ of Certiorari, Brief for Petitioner

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QUESTIONS PRESENTED

1. Whether clear Constitutional and palpable error is found in the decision that "gives weight to a claim" that the respondent's attorneys had located children who purportedly indicated that they would willingly offer testimony about [the Petitioner's] lack of parenting skills that would be harmful to his case.

2. Whether the Kentucky Court of Appeals makes patent and palpable error in affirming that "abuse" per Kentucky Revised Statute 403.270 possibly could have been found by the fact that the Petitioner allegedly '...failed to arrange for [the respondent's] arrival at the hospital on time as scheduled for their child's delivery'" in such a way that it is unconstitutional.

3. Whether a clear violation of the United States Constitution and in particular the Due Process clause of the Fifth Amendment exists in affirming the decision of the Laurel Circuit Court on the basis of the fact that "The social worker from the Cabinet for Families and Children who investigated the episode concluded that his actions constituted child abuse."

4. Whether Constitutional error exists in upholding the decision of the Court of Appeals on the basis of an alleged fact that Dr. Axibal went to Ukraine "with the goal of finding a wife he could control."

LIST OF PARTIES TO PROCEEDING BELOW

The parties to the proceeding at the Kentucky Supreme Court were:

Dr. Carlito Axibal	Petitioner
Oksana Axibal	Respondent

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

INTRODUCTION

Dr. Carl Axibal and Oksana Axibal met through a dating service that enables Ukranian women to meet American men. Oksana Axibal came to this country on a fiancee visa in August of 2001 to Florida where Dr. Axibal lived at that time. Dr. Carlito Axibal was 49 years old when he met Oksana who was then 25 years old. When Dr. Axibal entered the United States he was a resident in New York in internal medicine. He was unmarried and was not working as an emergency room physician.

Within thirty (30) days of arriving to the United States she became pregnant. The couple was married in November of 2001. Oksana Makarova, brought with her to the U.S. her four year old child, Dimitri Makarova. It was Oksana Axibal's desire that Dr. Axibal adopt Dimitri. The couple lived in Florida initially and the adoption proceedings were initiated there. Adoption proceedings were likewise initiated in London, Kentucky, when the couple relocated. Dr. Carl Axibal refused to conclude the adoption because he discovered that the biological father of Dimitri was looking for the child. (Prior to her arrival in the USA, Oksana had

informed Dr. Axibal that Dimitri's father was deceased.) In May, 2003, seven (7) days after receiving her green card, Oksana Axibal left the marital home with Dimitri and the Axibals' child, Giovanni, and went to a domestic violence shelter.

This divorce case was litigated for over one year before the Domestic Relations Commissioner in Laurel County, Kentucky. Numerous motions were filed and at one time, there was a lengthy hearing on temporary custody. The final hearing consumed two days. The last day of trial lasted sixteen (16) hours. At the trial, Dr. Axibal produced numerous e-mails from Oksana Axibal to her family in Ukraine that she had sent in Russian, detailing her plan of leaving Dr. Axibal, once she obtained her green card and was "living well" on the income from Dr. Axibal, as she was going to receive maintenance. These e-mails described a plan Oksana Axibal had to have her son adopted by Dr. Axibal and therefore receive child support for two children plus maintenance. She described in e-mails her dislike of Carl Axibal, but yet bragged about the lavish gifts he bestowed upon her.

Oksana Axibal was in the United States on a Petition filed by Dr. Carl Axibal for her permanent resident status. In brief, when a woman comes to the U.S. for marriage purposes, she first enters the country with a fiancee visa. This visa lasts 90 days. In order to remain in the U.S.A., a Petition for citizenship must be filed by the sponsor (American citizen). If that Petition is approved, the immigrant is granted conditional status in the United States. The couple must stay married for two years and after the two years expires, they must return to the INS for a subsequent interview. If the INS believes that the couple entered into the marriage in good faith after this interview, the conditional

status is changed to permanent status. If the couple divorces prior to the expiration of two years, the immigrant can file a petition for permanent status on his or her own and must show that the marriage was entered into in good faith but ended due to extreme mental cruelty. This provides the immigrant a waiver from the requirements and provides a means to bypass the two year marriage requirement. Oksana Axibal left the marital home for a domestic violence shelter to make her claim of domestic violence in order to secure her citizenship because the couple had not been married the requisite two years.

The Petitioner produced an e-mail in which Oksana indicated to a friend that she had found a way to get her citizenship prior to the expiration of two years. Various other a-mails were introduced, and entered as exhibits in the aforementioned proceeding, demonstrating Oksana's plan of staying with Carl just long enough to get citizenship and "draining him (Carl) of every dime".

The Domestic Relations Commissioner in Laurel County, Kentucky, stated on the record that Oksana has displayed a pattern of deceit. She likewise stated that Oksana had put forth a contrived and deceitful plan to marry Carl Axibal and obtain his money. The DRC also found that Oksana's plan preexisted her coming to the United States. Oksana admitted to the DRC that she had no love for Dr. Axibal. It was also apparent that she had no love for him according to the e-mails. E-mails are in evidence that reflect her instructions to her family to set up a bank account to place the money. She was also lying to Dr. Axibal about the need for money to provide this money to her family.

When this case was initiated, Oksana signed an Affidavit outlining numerous allegations against Dr. Axibal of

withholding medical care from her and the child. Two doctors' depositions were taken and of record. Evidence in the record supports the finding that the child was born healthy, with no complications.

Oksana admitted, during her testimony, that her argument to the Immigration and Naturalization Service was intended to obtain a waiver of the two year marriage requirement and eventually her citizenship on the basis of an allegation that she was a victim of domestic violence/extreme emotional cruelty. If she prevails with this argument, then she can remain in this country despite her divorce, prior to the expiration of the required two year period. It is apparent from the pleadings filed by Oksana that she was claiming that she was a victim of domestic violence; in fact, she was represented by attorneys from the Kentucky Domestic Violence Association. Testimony was given concerning Oksana Axibal's immigration status, which was a relevant custody factor. The DRC requested briefs on the immigration issues at the Pretrial Conference. The timing of Oksana's departure from the home, as well as all of her actions thereafter, were geared toward prevailing on her claims to the INS. In fact, an Affidavit was produced, by her immigration attorney, outlining that Oksana was claiming a waiver pursuant to extreme mental cruelty.

The facts of this case also show that, after the Respondent's son Dimitri had strayed away from the Petitioner and Respondent in a Wal-mart store, after having done this before, the appellant twisted his ear as a means of warning him against doing so in the future. This act, apparently, constituted the "abuse" that resulted in a finding that the Petitioner had thereby committed domestic abuse as defined in Kentucky Revised Statute 403.270. No other act of so-called abuse is invoked to strengthen this finding. This is only one of the errors in the instant case.

Hours of testimony were heard in regard to the "Walmart Incident". The Domestic Relations Commissioner's report properly reflects that there was no domestic violence or abuse. There was no domestic violence as to Oksana and no domestic violence as to Oksana's oldest child. Oksana, from the very beginning, argued emotional injury, which is a form of domestic violence. This again, was geared toward her immigration claim that she was a victim of "extreme mental cruelty."

In regard to the "Walmart Incident", the witnesses told conflicting stories. The Court should note that the most important factor is that the narrative report sets out Oksana's statement that "she would not allow the child to accompany her to the bathroom and told the child to go back to his daddy." Therefore, Oksana Axibal left a four year old Ukrainian child who couldn't speak English unaccompanied in Walmart. It was she, not Carl Axibal who percipitated the entire incident. be overruled.

STATEMENT OF THE CASE

The instant petition stems from a case in which the Laurel County domestic relations commissioner reached conclusions that were rejected by the Circuit Court after objections were filed. The facts of this case show that, after the Appellee's son Dimitri had strayed away from the Appellant and Appellee in Wal-mart, after having done this before, the appellant twisted his ear as a means of warning him against doing so in the future. This act, apparently, constituted the "abuse" that resulted in a finding that the Appellant had thereby committed domestic abuse as defined in Kentucky Revised Statute. 403.270. No other act of so-called abuse is invoked to strengthen this finding.

The instant petition focuses on undeniable, patent and palpable errors and violations of the petitioner's Constitutional rights existing on the face of the appellate opinion.

ARGUMENT

No matter what standard of review one applies, the petitioner respectfully argues that the decision of the appellate court cannot be upheld.[1] The instant motion points to blatant

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[1]These standards have already been cited in this case and are listed here in various citations. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey v. Sherfey, Ky., 74 S.W.3d 777, 782-83 (1986), Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). "The exercise of discretion must be legally sound." Id.; "A factual finding is not clearly erroneous if it is supported by substantial evidence and 'substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Kentucky Rule of Civil Procedure 52.01, Sherfey, 74 S.W.3d at 782; Carnes v. Carnes, Ky. 704 S.W.2d 207, 208 (1986); "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ··· has sufficient probative value to induce conviction in the minds of reasonable men." Allen v. Devine, 178 S.W.3d 517, 524; A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996); Clear and convincing does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people. Clemens v. Richards, 304 Ky. 154, 159, 200 S.W.2d 156, 159 (1947); We have interpreted the requirement of "manifest injustice" as used in RCr 10.26 (formerly RCr 9.26) to mean that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981).

constitutional violations and patent logical errors in the Appellate Court's order, all of which inure to the detriment of the appellant.

A.

Clear Constitutional and palpable error is found in the decision that "gives weight to a claim" that the respondent's attorneys had located children who purportedly indicated that they would willingly offer testimony about [the Petitioner's] lack of parenting skills that would be harmful to his case.

On page of seven of the Appellate opinion, the Court writes:

"The Court gave considerable weight to evidence of Carlito's troubled relationship with his two adoptive children. Sometime in 1992 or 1993, Carlito adopted the teenaged son and daughter of his deceased brother. When the girl was a high school student, she became pregnant. Carlito sent her to California to live with an aunt. He sent the boy back to the Philippines to live with relatives after the boy got into trouble with the authorities in Florida. Carlito maintained no contact with these children after he expelled them from his home. When questioned as to their whereabouts during the dissolution proceedings, he testified that he did not know. **Oksana's attorneys located the children, who indicated that they would willingly offer testimony about Carlito's lack of parenting skills that would be harmful to his case.** (emphasis added) When Carlito heard of this development, he set up a meeting with the children at his Florida home. Nevertheless, only his adopted daughter appeared for her deposition. The court considered the relationship of Carlito

with these children in evaluating his temperament as a parent."

This is an example of clear and palpable violation of the Confrontation Clause of the Sixth Amendment standing out blatantly, astonishingly enough, in an appellate opinion of the Commonwealth of Kentucky. Non-existent witness testimony is being used against the appellant on the basis of what the attorney for the appellee claimed such testimony would include, if such testimony did in fact exist.[2] Nevertheless, the Appellate Court opines in this way in the context of a supposed application of the "substantial evidence" standard, expressed as follows:

"[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men." Allen v. Devine, 178 S.W.3d 517, 524

Not only is the "evidence" in question not "substantial evidence" but it in fact never passed any initial requisite threshold evaluation such as Kentucky Rule of Evidence 401 and 403 and, in short, was therefore never

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[2]This in itself is reversible error on plain Constitutional grounds. However, the Petitioner also insists that this entire claim rests on a false factual basis. The Petitioner was present at the deposition of one of the children in question, Monalynn, who in fact never made any such claim as expressed above. What, then, was the source of this implication? Apparently, the entire idea of the appellant's "lack of parenting skills" originated in a claim made by the respondent's attorney as to what would be said in the event of any future testimony.

properly-admitted evidence in the first place.[3] These comments above are even more tenuous and untrustworthy than typical inadmissible hearsay, and yet they are offered in an appellate decision as a valid basis for affirming an opinion. Additionally, a close reading of the facts in the quotation above reveals that not one of these facts taken in itself, when seen objectively, supports any negative inference in regard to the appellant.[4]

Even more disturbing is the fact that, as the Court of Appeals admits on page seven of the appellate opinion, the trial court gave "considerable weight" to this "evidence." If in fact "the court gave considerable weight to 'evidence'" the inclusion of which in the opinion constitutes palpable error, then does not simple logic tell us that the opinion should be reversed on this point alone? In short, the Court's affirmation of the "considerable weight" given to this is a palpable error indicating an abuse of discretion resulting in a manifest injustice.[5]

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[3]Also, apart from the obvious Sixth Amendment issue: Where is the record of this claim discussed above? Does it even exist in the record? If not, how did it find its way into the opinion affirmed by the Court of Appeals? Needless to say, the trial court and certainly the Appellate Court should only consider any such assertion if it is part of the record.

[4]The Domestic Relations Commissioner originally made findings substantially weighted towards the Appellant. After the filing of an objection, however, Judge Messer of the Laurel Circuit Court substantially reversed these findings in an opinion containing the constitutional abuses discussed in this motion as well as other more basic errors. For example, in his Decree of dissolution of Marriage, Judge Messer stated: "It is further ordered and Adjudged that the "the respondent shall pay to the petitioner one lump sum maintenance payment of $20,000, payable within (30) days of this order." In point of the fact, Dr. Oxibal was the Petitoner and Oksana was the Respondent; the Circuit Court was mistaken on this point and others in its final order.

[5]Abuse of discretion in relation to the exercise of judicial power implies arbitrary or capricious disposition under the circumstances, at least an

Again, the Appellant's instant argument does not even focus on the fact that the above quotation from the Court of Appeals is based on falsehood; nor does it focus on the irrelevance of the above discussion. Most significant here is the palpable error in the Appellate opinion itself. One does not even need to revisit the error here; nor can this error and Constitutional violation be explained away by the repeated invocation of the phrase "substantial evidence." Also, this error, as is made clear below, is a single example among others that, in the entire opinion taken as a whole, creates the mere illusion of "substantial evidence."

The Court itself indicates clearly the "considerable weight" given to the above. As if to minimize this "considerable weight" given to this improper and inadmissible evidence, the Respondent argues that there were other factors relied on by the Court that weren't tainted by such palpable Constitutional error, and that because of this, this Honorable Court may simply overlook this abuse of discretion. This is simply untrue, both legally and factually.[6]

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unreasonable and unfair decision. Sherfey v. Sherfey, Ky., 74 S.W.3d 777, 782-83 (1986), Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). The exercise of discretion must be legally sound." Id. A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). We have interpreted the requirement of "manifest injustice" as used in RCr 10.26 (formerly RCr 9.26) to mean that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981).

[6]The Movant avers that Monalynn did not state in her deposition that she will testify against the Movant. Monalynn's testimony is that she became pregnant in the Philippines, not Florida. She went to live with the movant's sister in California, not "other persons." Additionally, Ralph

As if in order to cure this defect, the Respondent mentions two telephone calls Oksana had with the children. According to the Respondent, these calls were "recorded and transcribed" and attached as exhibits to a pleading in a Rule 11 proceeding, along with various emails, as if this somehow satisfied a certification requirement in a hearsay admissibility statute.[7] Of course it does not.

The Respondent argues that this inadmissible evidence "...clearly states the good faith basis for believing that the adoptive children of Movant would testify against him." At issue, however, is not the good faith or bad faith in the provision by the Respondent's attorney of what the Respondent calls "potential evidence." Even assuming that the content of any such "potential evidence" is in fact what the Respondent's attorney claims it is, the basic due process and Sixth Amendment rights to which virtually everyone in the Movant's position is entitled were simply rejected here.

Needless to say, the reason why statutes such as KRE 401 and 403—not to mentioned all the codified hearsay prohibitions and exceptions derived from the Common law—

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has no record of any crime in any Florida police precincts in regard to marijuana or anything else. Monalynn and Ralph were not involved in the divorce case; still, according to them, the Respondent and her counsel called them repeatedly and urged them to testify against their adoptive father. It simply is not true that these children indicated that they would willingly offer testimony about Movant's lack of parenting skills. The Movant avers that Monalynn did, however, state in her testimony that, in her opinion, Oksana was just using her adoptive father to get money and be in the USA. At the very least, the Movant respectfully suggests that an evidentiary hearing and/or record review is necessary in regard to these claims.

[7]Were the children notified that their calls were to be used against the Movant? The Movant avers he was not made aware these were introduced as exhibits in the court of Judge McGhee.

exist is to set threshold requirements for what can be deemed to be evidence. Evidence is either admissible or inadmissible; there is no third category known as "potential evidence" which a court may consider. The Respondent here invents a non-existent category called "potential evidence," as if this were something in which any court could possibly invest any credence. Of course, it cannot. **Additionally, the Court expressly claims it has given "substantial weight" to what the Respondent calls "potential testimony."**

Next, it is of course axiomatic that cross-examination can bring to light certain elements in a claims that can change the entire color of what a claim appears to be on its face. Because of this, the right to cross-examination exists in the Constitution. Here, the Respondent is effectively arguing that this right can simply be dispensed with in this instance because the purported content of the telephone calls is transparent and cannot be reinterpreted in any other way than that claimed by the Respondent. Such a presumption is in fact anathema to the history and spirit of Anglo-American jurisprudence.

A useful comparison can be made between the instant case and a seminal United States Supreme Court criminal case also involving children and the right to cross-examination. In Maryland v. Craig, 497 U.S. 836, the United States Supreme Court expounds in depth on the reasons why the right to confront witnesses is a core value protected by the Constitution. The United States Supreme Court in Maryland v. Craig opines:

"The primary object of the constitutional provision in question [i.e. Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the

prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox, supra,* 156 U.S., at 242-243, 15 S.Ct., at 339-340.

The right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green, supra,* 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation, physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."

[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than

'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult"); *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries * 373-* 374.

Finally, the Respondent points to no other factor indicating that, even though the Movant was not afforded a right of cross-examination, the reliability of the so-called "potential testimony" is otherwise assured. This is particularly true when it comes to the testimony of children; and even more so when the Court admittedly "gives considerable weight to this testimony." Please also see the attached affidavit in which Ralph Axibal retracts statements previously made.

B. The court of appeals makes patent and palpable error in affirming that "abuse" per KRS 403.270 possibly could have been found by the fact that the Appellant allegedly '...failed to arrange for [the appellee's] arrival at the hospital on time as scheduled for their child's delivery.'"

On page eight of the appellate opinion, the Court opines:

"The Court also found that Carlito failed to take care that Oksana received proper prenatal care when she was pregnant with Giovanni, including his failure to arrange for her arrival at the hospital on time as scheduled for the baby's delivery."

In addition to pointing out the fact that Dr. Axibal was on call as an emergency room physician and unable to get away from his work at the time of the birth of his son,[8] the Appellant also points out the patent error and illogicality of the Appellate Court, as indicated below. The Appellate Court continues on page eight:

"Carlito argues that the court erred in considering his conduct during the prenatal period, violating KRS 403.270(3), which directs in part that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." **Although Carlito's neglect of Oksana during her pregnancy did not result in any apparent physical problems for Giovanni, it nonetheless could have had a significant impact on the child's health and well-being." (emphasis added)**

First, please note the erroneous and inappropriate use of the word "neglect" in the quotation above. "Neglect" is of course a legally significant word, a term or art, particularly in the instant context; it is noteworthy, then, that the Court of Appeals uses the word so casually here and apparently even finds the Petitioner guilty of "neglect" without any due process considerations. Has Mr. Axibal been found guilty of "neglect"? Was any sort of neglect petition filed against him? If not, then why would the appellate court find here that he had committed "neglect" when that issue had not even been before the court?[9]

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[8]Please see record of oral testimony.

[9]When it comes to divorce proceedings, Kentucky of course observes a no-fault policy in regard to spouses. Even if it did not, does the Appellate Court still really opine here that the fact that the Appellant had to work his shift at the hospital when his son was born means he had neglected his wife? This is unreasonable, but even if it were not, is this assertion at all relevant to the matters before the Court? It is not relevant. The

Were the Appellate Court to argue in response that the word "neglect" was used in a more general sense without specific legal connotations, it should then be pointed out how this word is used in the context of a patently illogical sentence in order to uphold a baseless judicial finding against the Petitioner. In other words: how could the Petitioner's absence at the birth of his son (Giovanni) possibly have any effect at all (let alone a "significant impact") on him in any viable legal sense? Obviously, this raises the issue of causation by analogy. To borrow from other legal disciplines such as criminal law and torts, certain legal standards exist for the imposition of causation in any meaningful way.[10] According to any possible rational approach to causation, the assertion of the appellate court ("**Although Carlito's neglect of Oksana during her pregnancy did not result in any apparent physical problems for Giovanni, it nonetheless could have had a significant impact on the child's health and well-being**") cannot be anything more than a patent logical non-sequitur. Absence from the birth of the child cannot have affected the child in any way contemplated in KRS 403.270. Simple logic tells us that there isn't even a mere scintilla of reasonableness in this claim, let alone enough to satisfy a standard of "substantial evidence."[11]

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discursive function of this so-called "fact" in the appellate opinion appears simply to be a means of besmirching the appellant's moral character.

[10] These standards are of course so well-known to the Court that there is no need to mention them specifically.

[11] Additionally, it is Dimitri, not Giovanni, who is the child in regard to whom the issue of "abuse" originally arose. Again, it is useful to note the discursive function of the above quotation in the appellate opinion, i.e., to paint the appellant in a negative light, even when this particular underlying fact when viewed rationally does not support such a view. Even so, the Appellate Court apparently suggests, in the context of an argument that Dr. Axibal should not have custody of his son, that the fact that the Appellant was working when his son was born "ultimately could

This palpable error is evident on the face of the Appellate opinion and does not require any reconsideration of the record; additionally, it constitutes an abuse of discretion resulting in a manifest injustice. Partin at 224, Sherfey at 783, Kuprion at 684, Schaefer at 218.

C. The Court upholds a clear violation of the United States Constitution and in particular the Due Process clause of the Fifth Amendment by affirming the decision of the Circuit Court on the basis of the fact that "The social worker from the Cabinet for Families and Children who investigated the episode concluded that his actions constituted child abuse."

In this paragraph on page 11, the Appellate Court first addresses the testimony supporting the appellant's argument that his act of ear-twisting does not rise to the level of "abuse" as contemplated by KRS 403.270. Then, as if in response to this, the opinion continues:

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have a significant impact on the child's health and well-being." This is unreasonable, and is followed by comments that are equally unreasonable. What immediately follows in the Appellate opinion is the attempt to level and adequate the two parties when it comes to moral character. The Appellate Court then writes on page nine: "The findings of fact of the trial court are supported by substantial evidence in the record, and they demonstrate that neither party was blessed with a sterling character. The court candidly acknowledged their mutual shortcomings. In exercising its discretion, the trial court elected to entertain [Dr. Axibal's] actions at the time of Giovanni's birth, giving greater weight to his actions rather than to Oksana's conniving to use her marriage to Carlito as a means of gaining citizenship and economic security." In other words, the Court of Appeals actually affirms a holding that the fact that Dr. Axibal was at work when his son was born outweighed the fact that the appellee was—even according to the admission of the Appellate Court—using the entire marriage as a means of defrauding the appellant.

"The social worker from the Cabinet for Families and Children who investigated the episode concluded that his actions constituted child abuse. We cannot agree that the court abused its discretion in determining that Carlito's reaction was highly inappropriate and that it was abusive behavior."

In the quotation above, the Appellate Court points to a conclusion that a social worker makes and then conflates this with the trial court in the next sentence. Needless to say, neither trial courts nor appellate courts are supposed to "rubber stamp" the so-called "conclusions" of interested parties and individual litigants. Even so, the Appellate Court's language is telling and indicates the Constitutional violation thrust upon the Appellant: the opinion clearly states: "The social worker...concluded...child abuse" and virtually no finding of fact follows this assertion. The Appellate Court apparently and wrongly treats the social worker's allegation itself as judicial finding of fact, when of course it is not.

In any meaningful legal sense, social workers don't make *conclusions*. They make *allegations*. It is the finder of fact who makes *conclusions*, after properly considering the evidence in a hearing. Even so, the Appellate Court attributes all the fact-finding power to the social worker here. Indeed, there is a glaring gap between the first and second sentences in the quotation above: we find no discussion whatsoever of any facts or expert authority supporting this finding of abuse. Rather, any authority to support this finding is vested in a single extra-judicial conclusion of a social worker, who is of course a partisan actor, and is not drawn from its rightful source, i.e., the record of a hearing

observing all Constitutional protections such as the right to cross-examine witnesses, etc.[12] Even if a social worker does arrive at an intra-agency conclusion, this in itself cannot possibly satisfy a "substantial evidence" standard. Indeed, the appellate opinion contains virtually no mention of any judicial finding to support this conclusion. Rather, the mere existence of the social worker's conclusion itself is offered as "substantial evidence."

Not only is this not substantial evidence, but the example above is patent and palpable error resulting in a clear violation of the Due Process clause of the Fifth Amendment and the Separation of Powers doctrine. Again, the Appellant does not need to controvert any particular finding of fact in order to demonstrate this: rather, this palpable error exists on the face of the appellate opinion. Partin at 219, Sherfey at 783, Kuprion at 684, Schaefer at 218.

In regard to the conclusion of the Social worker that "abuse" had occurred, the Respondent argues that "Movant's argument is not the only evidence relied upon by the trial court in making its decision." Then, the Respondent makes various claims about several people said upon allegedly viewing the twisting of the ear.

However, in point of fact, the Respondent respectfully avers that there is no testimony of Dimitri "screaming" as was claimed by the Respondent in her response. The Respondent also characterizes the states of mind of the

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[12]This is even more of a Constitutional violation here when we consider that the Cabinet for Families and Children never even filed a petition against Dr. Axibal. In such an instance, the Court arguably should take even more due process precautions.

witnesses ("disturbed") with no reference to the record for support of this. Additionally, the Respondent admits that "the trial court noted that there was conflicting evidence about what happened prior to the ear twisting."

After making various claims about the act of ear-twisting unsupported by references to the record, the Respondent's final argument in this regard mentions Krug v. Krug, 647 S.W.2d, with the following language:

"[Krug v. Krug] gives "...the trial court the authority to decide that an adverse impact would occur on the child in question if the abuse was permitted to continue. Id at 11. Based on Krug, a judge is not required to wait until the child at issue is injured before giving consideration to the conduct in relation to the determination of custody of the child in question."

However, at issue in the motion for discretionary review is specifically the finding of abuse of Dimitri, not custody of Giovanni. This principle from Krug of course does not apply to the issue of whether the Movant actually abused Dimitri.

D. The Appellate Court erred in upholding the decision on the basis of an alleged fact that Dr. Axibal went to Ukraine "with the goal of finding a wife he could control."

The Appellate Court also opines that Dr. Axibal went to Ukraine "with the goal of finding a wife he could control," (appellate opinion at page 7) supposedly citing e-mails which reflect the degree to which the Appellant "directed and controlled Oksana's actions." (opinion at 7) The court even indulged a digression on how the Appellant "had rejected an earlier fiancée, forcing her to return to Ukraine when she

refused to sign a prenuptial agreement." (opinion at 7) Once again, we see here what has been shown above to be fairly commonplace in the Appellate opinion: the implied attribution of malevolence to certain facts with no basis for doing so, and then painting this spurious innuendo as a finding of fact in order to affirm the opinion of the Laurel Circuit Court.

Once again, let us look rationally at the facts mentioned above, beginning with the latter example of the alleged "rejection" of a possible spouse because—according to the Court of Appeals—she wouldn't sign a prenuptial agreement. First of all, the woman in question was a native of Ukraine; it was therefore beyond the purview of the appellant's power to "force her to return" to her home by exercising his choice not to enter into a marriage with her. Rather, reason tells us that if the Appellant had chosen not to marry this Ukrainian woman, it is not he who forces her to remain in Ukraine; rather, she will remain in the Ukraine because she will not come to the United States on a marriage visa.[13]

Additionally, the Commonwealth of Kentucky upholds the right of its residents to enter into lawful prenuptial agreements, which are routinely upheld by Kentucky courts. Even so, the bias in the appellate opinion against the appellant for asserting this right is unmistakable. Needless to say, it is improper for any court of the Commonwealth, let alone the Court of Appeals, to use a citizen's assertion of a lawful right as a means of purportedly

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[13] This claim by the Court of Appeals is first of all entirely irrelevant. It also unsupported by any evidence in the record. Divorce proceedings in Kentucky observe a no-fault policy. Is this malappraisal of Dr. Axibal's character in regard to a woman he had once courted, then, relevant in regard to whether he would be a fit custodian of his son?

unveiling a flaw in his character by doing so. Again, "[a]buse of discretion in relation to the exercise of judicial power implies arbitrary or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey at 783, Kuprion at 684. "The exercise of discretion must be legally sound." Id.

With Sherfey and Kuprion in mind, let us now examine the specific claim that Dr. Axibal went abroad with "the goal of finding a wife he can control." Does the Court of Appeals advance this claim as an actual finding of fact? If so, in relation to what? In other words, how is such a claim relevant? Additionally, even if this claim were relevant, what is its origin? Is it in the record? Who possessed the training and credentials in the field of mind-reading in order to plumb the depths of Dr. Axibal's soul and apparently uncover this sinister motive?[14]

Reading the appellant's mind in this way is neither in the proper scope of the rightful activity nor the zone of competence of any of the lower courts involved in this case. This obviously is not "substantial evidence." Allen at 524. This is rather abuse of discretion resulting in a manifest injustice. Partin at 224, Sherfey at 783, Kuprion at 684, Schafer at 218.

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[14]It seems more reasonable that any such claim—provided that it even existed in a hearing in the first place—would be more prejudicial than probative and unable to survive a KRE 403 balancing test. Since the appellate court has indicated that this is in fact a finding of the court, perhaps it would be useful to look for the introduction of any such claim in the record. If this claim does not exist there, then an important question is raised: how did a claim such as this find its way into the opinion of the Laurel Circuit Court?

CONCLUSION

The evidence of the record substantially supports the original Decree's award of sole custody to the Petitioner and that the DRC based it upon the factors enumerated in Kentucky Revised Statute 403.270. In regard to the interaction and the relationship with his parents, his siblings, and any other person who may significantly affect the child's best interest, there was testimony by witnesses as to how favorably Carl Axibal interacted with the child as well as how the child interacted with other persons in Dr. Axibal's household including his cousin, Estenieta M. Thomas. Various people from the Filipino community in London, testified that the Filipino residents in London were a close-knit community and that they have gatherings that the child attends. As to the child's adjustment to his home, school and community, there was testimony that the child is happy at Dr. Axibal's home. Oksana noticed the deposition of Carl Axibal's adult daughter claiming that the daughter would testify about how cruel and abusive Carl Axibal was to her. Instead, his daugher, Monalynn Axibal, had only good things to say about her father. In addition, please see attached affidavit in which Ralph Axibal, Dr. Axibal's adopted son, retracts earlier statements made.

As to the mental and physical health of all individuals involved, the only testimony in regard to a physical condition of Dr. Axibal's was that he has high blood pressure and he took medication for that condition. His high blood pressure, absent further complications, did not convince the DRC that he was unfit for child custody. Other minor ailments were brief episodes of illness that resolved.

The Domestic Relations Commissioner found that the Oksana was a pathological liar. Oksana, from her very first

affidavit, lied about Carl Axibal. The evidence revealed a pattern of deception. The trait of lying certainly goes to Oksana's mental health and to her moral character, which is to be considered by the Court in awarding custody.

In regard to maintenance, it was apparent from the numerous emails that were produced, that Oksana Axibal did in fact intend to perpetuate a fraud on Dr. Axibal. This was a short term marriage consisting of sixteen (16) months. The DRC found that the Oksana was highly intelligent and had the physical and emotional ability to do most anything. This statement by the DRC distills the essence of the findings of the two-day trial. A point of interest that should be noted is that Oksana initially claimed to not be able to speak English, but then later on in the proceedings admitted to being able to speak English having had several years of English training in the Ukraine. She likewise has a college degree from Ukraine. The expense of a translator was incurred due to her claim of inability to speak and understand English.

Just because Oksana Axibal ran to a domestic violence shelter does not mean that she was a victim of domestic violence. As the emails in evidence show, Oksana Axibal had contrived a plan to leave Dr. Axibal and had "figured out a way" to get a divorce from him prior to the lapse of two years, all the while attempting to protect her immigration status. She did this by abandoning the marital home seven (7) days after she got a green card, going to a domestic violence shelter, and setting up her claim with the immigration service to remain in the United States.

Peggy Phillips, who testified for Oksana, was a person with whom Oksana went to church. This woman was a member of the church in Mt. Vernon where the shelter brought their residents on Sundays. Peggy Phillips testified that she had

given Oksana furniture and even had allowed Oksana to drive her car for six weeks. However, Peggy Phillips did not know that Oksana was receiving money from Dr. Axibal, including $1,500.00 in child support per month. The Court found that Oksana was lying to this church, using for her own purposes. She was manipulating them to obtain furniture and other items when she had funds available.

Shaina Goggins, testified that Oksana was receiving money from the domestic violence shelter for start up costs for her apartment, yet she had at least $2,500.00 of her own funds that she could have used.

The record indicates that Oksana married Dr. Axibal with the intention of defrauding him, for the economic reason of obtaining money and United States citizenship. This was shown in her emails accepted as exhibits in court.

Dr. Axibal's nephew and adopted son Ralph had no criminal record and was not arrested for any crime. It was stated incorrectly that Ralph had a criminal record for being a drug addict. The attorney for the respondent initiated contact with the children and solicited negative testimony. A claim was made that one child, Monalynn, and also Ralph, would testify against Dr. Axibal. This was incorrect.

Sole custody arrangements are rare, and are usually limited to situations in which one parent has been deemed unfit or incapable of having any form of responsibility over the child. There was no finding that Dr. Axibal was abusive to his son Giovanni. Also, Oksana was never able to prove that she was the victim of domestic abuse.

A finding of abuse was made against Dr. Axibal. However, the social worker, when she was interrogated,

acknowledged that there was no petition of any abuse in regard to twisting the ear of Oksana's son Dmitri.

The palpable errors affirmed by the Court of Appeals and discussed above result, in their totality, in a miscarriage of justice. Taken as a whole, the appellate opinion generates the illusion of "substantial evidence" which does not exist on closer logical scrutiny in light of the law. The Appellant respectfully moves this Honorable Court to review the decision upheld by the Court of Appeals and for all applicable relief, including reversing the decision affirming the finding of abuse per KRS 403.270 and/or a remand of the issue of abuse per KRS 403.270 to the trial court.

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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Covington, KY 41011
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COMMONWEALTH OF KENTUCKY
27~ JUDICIAL CIRCUIT
LAUREL CIRCUIT COURT
CIVIL ACTION NO. 03-CI-00418
DIVISION II

IN RE: THE MARRIAGE OF CARLITO AXIBAL AND OKSANA AXIBAL, AND THE CARE, CUSTODY AND SUPPORT OF ONE (1) MINOR CHILD OF:
CARLITO AXIBAL, PETITIONER
VS.
OKSANA AXIBAL, RESPONDENT

*****

AFFIDAVIT OF RALPH AXIBAL

Comes now the affiant, and having been sworn, states:

(1) I am the nephew of Carlito Axibal. My uncle Carl adopted me and my sister, Monalynn, following the death of our father.

(2) Monalyrm and I came to the United States to live with our uncle/father. We lived with him at his home in Florida.

(3) During the time that we lived there, I attended school.

(4) During the years that I lived with him, my uncle tried to encourage me to attend school and do well in school and to associate with nice people.

(5) During a portion of the time I lived with him, I was also enrolled in Sylvan Learning Center to try to improve my school work and grades.

(6) During the last months I lived with my uncle, he and I had some disagreements over my school

performance and those with whom I was spending time.

(7) In. the past months, I have been contacted by Joanne Pyc and Oksana Axibal and questioned regarding my relationship with my uncle.

(8) My sister and I decided to play along with their questions to try to discover what was going on. We had not been in contact without uncle for sometime.

(9) I was initially angry to hear about anything involving my uncle. When we parted, several years ago I was angry with him because he took me back to the Phillipines rather than allow me to stay in the United States.

(10) Over several weeks, Joanne Pyc and Oksana contacted us on several occasions. During that time, I described a situation with my uncle that included him hitting me.

(11) After several contacts, I was asked if I would be willing to give testimony in the divorce case between Oksana and my uncle. I initially agreed to cooperate and then told Joanne Pyc that I no longer wanted to be involved. I told her that what I had related to them regarding being struck by my uncle was not true and that I had lied to them.

(12) The lies that I told about our relationship to Joanne Pyc and Oksana were my way of getting back my uncle.

(13) Sometime before the date my deposition was scheduled, I had told Joanne Pyc and Oksana that what I had told them was not the truth. I sent an

e-mail explaining all this to them.

(14) I asked that neither Joanne Pyc nor Oksana should contact me or my sister again.

Further, the Affiant sayeth naught.

STATE OF NORTH CAROLINA
COUNTY OF NASH
Subscribed and sworn to before me by Ralph Axibal on this the first day of June, 2004.

Phyllis S. Joyner
NOTARY PUBLIC
My Commission Expires: 10/14/04

Supreme Court of Kentucky

2006-SC-0508-D
(2005-CA-0497)

CARLITO AXIBAL MOVANT

LAUREL CIRCUIT COURT
NO. 2003-CI-0418

v.

OKSANA AXIBAL RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Minton, J, not sitting.

ENTERED March *14*, 2007.

Joseph Lambert
Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

Carlito Axibal APPELLANT

APPEAL FROM LAUREL CIRCUIT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 03-CI-00418

Oksana AxibalAPPELLEE

OPINION AFFIRMING

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR

JUDGE.

COMBS, CHIEF JUDGE: Carlito Axibal appeals an order of the Laurel Circuit Court of February, 2, 2005, which denied his motion to alter, amend or vacate its Findings of Fact, Conclusions of Law, and the Decreee of Dissolution of Marriage. Axibal contends that the circuit court abused its discretion in awarding primary custody of their minor son to his ex-wife, Oksana, and in awarding Oksana a lump sum maintenance payment of $20,000.00. Finding no error, we affirm.

A native of the Philippines, Carlito is a naturalized citizen of the United States. He is a physician. He met Oksana, a native of Ukraine, through a dating serviice. Oksana moved from Ukraine to the United States on a Fiancé Visa. She was accompanied by Dimjtri, her minor son from a previous relationship. Carlito and Oksana were married in Florida on November 17, 2001. They moved to London in Laurel

County, Kentucky. At the time of the marriage, Carlito was fifty-one years of age and Oksana was twenty-three.

They had one child, Giovanni, who was born on July 4, 2002. The couple separated on May 5, 2003, and Carljto filed a Petition for Dissolution of Marriage the very next day. At that time, Oksana left the marital home, taking both of the children with her. She spent the next three months living in a domestic violence shelter and then in transitional housing. During this period, Carlito was granted visitation with Giovanni and paid Oksana child support for him. In an order entered on January 26, 2004, the Laurel Circuit Court granted Carlito equal parenting time with Giovanni and awarded Cksana an increase in her child support in the amount of $1,500.00 per month.

The dissolution action was heard before a Domestic Relations Commissioner (DRC) on May 12 and June 9, 2004. The DRC recommended that sole Custody of Giovanni be granted to Carlito and that no child support or maintenance be awarded to either party. Objections, responses, and a reply to the DRC's report were filed. After conducting a hearing, the Laurel Circuit Court entered Findings of Fact, Conclusions of Law, and a Decree of Dissolution of Marriage which were substantially contrary to the recommendations of the DRC. The trial court granted sole custody of Giovanni to Oksana, awarded her one lump sum maintenance payment of $20,000.00 and set child support in the amount of $2,000.00 per month. The court also made a finding that Carlito had committed domestic violence. Carlito filed a motion to alter, amend, or vacate the judgment. His motion was denied. This appeal followed.

We review a trial court's findings of fact for clear error. We are governed by a stringent standard which dictates that:

due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is Supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce Conviction in the minds of reasonable people. Sherfey v. Sherfey, 74 5.W.3~ 777; 782 (Ky.App. 2002) (citations and quotation marks omitted).

When a trial court applies the law to facts supported by substantial evidence, its award of custody "will not be disturbed unless it constitutes an abuse of discretion." Abuse of discretion is defined as "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." id. at 782-B3.

We shall begin our analysis with the issue of child custody. KRS2 403.270(2) requires that a trial court determine custody based on the best interests of the child as determined by the following factors:

(a) The wishes of the Child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with hi~ parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in ECRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

KRS 403.270(2).

Carlito argues that the court abused its discretion in awarding sole custody of Giovanni to Oksana. He alleges that the court failed to give adequate consideration to evidence of Giovanni's adjustment to his home, school, and community pursuant to KRS 403.270(2) (d). Carlito's current residence, which is the former marital home, is located in an. area with a relatively large number of families of Filipino origin who frequently engage in social events, He contends that it would beneficial for the child to "have an environment in which he can explore his hereditary nature." He also claims that the court failed to give sufficient weight to the fact that his current house is the home in which Giovanni resided from

birth until the time of his parents' separation (approximately ten months).

There is no doubt that Giovanni might derive great benefit culturally from associating with a community sharing his father's ethnic background or from living in the familiar surroundings of his home. However, these factors do not outweigh the substantial evidence relied upon by the court in making its decision.

> Obviously, the record contains plenty of evidence that would support a decision
> contrary to that reached by the . . . court. But the fact that the record contains
> evidence that would support a different result does not mean that the court's decision must be reversed. C.M.C.v. A.L.W., 180 S.W.3d 485, 494 (Ky.App. 2005).

Carlito also contends that the court failed to consider the interaction of the child with his parents pursuant to KRS 403 .270(2) (c). He maintains that Oksana's behavior, which he describes as "improper and deceitful," could have an adverse effect on a young child. He cites specifically to emails in the record indicating that Oksana was interested only in obtaining her 2~merican citizenship and was then immediately intending to divorce Carlito for the purpose of financial gain. He cites this evidence as indicative of her lack of respect for the American legal system and the Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Services under the Department of Homeland Security as of March 1, 2003). He points also to her admission that she did not love Carlito at the time of the marriage; he relies on evidence that she fabricated allegations of domestic violence on his part in order

to circumvent the requirement that she be married for two years before obtaining her American citizenship.

The trial court acknowledged that Oksana was primarily interested in marrying Carlito in order to provide a home for Dimitri—as well as to enjoy a better standard of living. The court found that Oksana encouraged Carlito to adopt Dimitri, having misled Carlito about the status of Dimitri's natural father (Apparently, she told Carlito that he was dead when he in fact is alive.) The court also found that Oksana spoke of premeditated plans to divorce Carlito and to obtain substantial amounts of money from him after having obtained American citizenship by virtue of the marriage.

Nonetheless, the court found that Carlito went to Ukraine "with the goal of finding a wife he could control," citing e-mails which reflect the degree to which Carlito directed and controlled Oksana's actions. The court also noted that Carlito had rejected an earlier fiancée, forcing her to return to Ukraine when she refused to sign a prenuptial agreement.

The court gave considerable weight to evidence of Carlito's troubled relationship with his two adoptive children. Sometime in 1992 or 1993, Carlito adopted the teenaged son and daughter of his deceased brother. When the girl was a high school student, she became pregnant. Carlito sent her to California to live with an aunt. He sent the boy back to the Philippines to live with relatives after the boy got into trouble with the authorities in Florida. Carlito maintained no contac~ with these children after he expelled them from his home. When questioned as to their whereabouts during the disso1utj0~ proceedings, he testified that he did not know. Oksana's attorneys located the children, who indicated that they would willingly offer testimony about Carlito's lack of

parenting skills that would be harmful to his case. When Carlito heard of this development, he set up a meeting with the children at his Florida home. Nonetheless, only his adopted daughter appeared for her deposition. The court Considered the relationship of Carlito with these children in evaluating his temperament as a parent.

The court also found that Carljto failed to take care that Oksana received proper prenatal care when she was pregnant with Giovanni, including his failure to arrange for her arrival at the hospital on time as scheduled for the baby's delivery. Carlito argues that the court erred in considering his conduct during the prenatal period, violating KRS 403.270(3), which directs in part that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." Although Carlito's neglect of Oksana during her pregnancy did not result in any apparent physical problems for
Giovanni, it nonetheless could have had a significant impact on the child's health and well-being. Furthermore, the court also considered Carlito's behavior immediately after Giovanni's birth, noting that he was not present at the birth and that he left Oksana alone with Giovanni and Dimitri only two weeks after Giovanni's birth in order to go to Florida for at least a week.

We are not persuaded that the court erred in weighing the evidence of this behavior as it was related to and indicative of Carlito's role as a parent.

The findings of fact of the trial court are supported by substantial evidence in the record, and they demonstrate that neither party was blessed with a sterling character. The court candidly acknowledged their mutual shortcomings. In exercising its discretion, the trial court elected to entertain the

evidence of Carlito's treatment of his adoptive children and his actions at the time of Giovanni's birth, giving greater weight to his actions rather than to Okeana's conniving to use her marriage to Carlito as a means of gaining citizenship and economic security. The court was neither arbitrary nor unreasonable in its evaluation of the relative weight of peccadilloes of both parties, and we can find no abuse of discretion.

Carlito has objected to the court's finding that Oksana had always loved and provided for Dimitri, arguing that "love" is not one of the statutory factors to be considered in determining the best interests of the child. We are convinced that: this finding was intended to illustrate a glaring contrast between Oksana's relationship to her child and Carlito's behavior toward his adoptive children and Giovanni. In light of the court's exhaustive findings of fact, we cannot conclude that the court utilized this line of analysis as its only consideration in awarding sole custody to Oksana.

Carlito cites as error a finding of the court that he committed an act of domestic violence when he twisted the ears of Oksana's son Dimitri while the family was shoppinq at WalMart. This incident Occurred when Oksana went to the women's restroom and refused to take Dimitrj with her, telling him to go look for Carlito. Dimitri, who was four years of age at the time, got lost in the store and wandered out to the parking lot. When Oksana and Carlito found him with the assistance of the WalMart staff, Carlito twisted Dimitri's ears as discipline. Carlito kept repeating to Oksana that she was going to have to choose between Dimitri and him, threatening to send Dimitri back to Ukraine.

RRS 403.720 defines domestic violence and abuse as:

physical injury, serious physical injury, coxu&l abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse or assault between family members or members of an unmarried couple.

Carlito contends that his behavior does not fit this definition of domestic abuse because a social worker who examined the child immediately following the ear-twisting incident found no physical injury other than redness around the ear. Furthermore, two witnesses for Carlito testified that ear twisting is a common method of disciplining children in the Filipino culture. The social worker from the Cabinet for Families and Children who investigated the episode concluded that his actions constituted child abuse. We cannot agree that the court abused its discretion in determining that Carlito's reaction was highly inappropriate and that it was abusive behavior.

Carlito argues that even if he bad committed an act of domestic violence against Dimitri, the court failed to explain how it affected Giovanni as required under KRS 403.270(3): "[if domestic violence and abuse is [sic] alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the ch1ld'~ relationship to both parents." However, the court did provide that statutorily required explanation:

In making a determination under 403.270(3) as to whether the domestic violence has affected the child in question, Giovanni, the Court notes that Giovanni was present when the abuse occurred but that Giovanni was very young and was not directly affected by the abuse. On the other hand, in 647 S.W.2d 790 (Ky. 1983), the Court made it clear that even though neglect or abuse has not yet affected a child the Court can decide that an adverse impact would occur if permitted to

continue. A judge then is not required to wait until a child has been hurt before he can give consideration to the conduct causing the injury. Notwithstanding the lack of credibility of [Oksana3 at times and her motive to lie, the Court finds by a preponderance of the evidence presented in this case that rcarlitoj has been physical[lyj abusive to Dimitri on more than one occasion. It is likely that [Carlito] would continue such abuse and that the child of the parties would also be a victim and thereby be adversely affected.

The court based its determination both on substantial evidence and on relevant case law. We find no error.

Carlito next argues that the court erred in failing to give weight to the testimony of a Ms. Thomas, who lived with the Axibals in Florida. She stated that Carlito had a good relationship with Dimitri and that he always took good care of Oksana and their child. Carlito also notes that Oksana would grab Dimitri's head and hair and put his face in his food in order to discipline him, He contends that the court failed to give due weight to Oksana's lack of judgment in travelling with Dimitri from Warsaw to New York City with no money. According to Carlito, evidence of these incidents is contained in the transcripts of hearings held on May 9 and June 9 (no year provided). However, these transcripts are not included in the record on appeal.

It is the duty of the appellant to see that the record is complete on appeal. To the extent that the record is incomplete, the reviewing court must presume that the omitted portions support . . . the judgment.

Roberts v. Fayette County Bd. of Educ., 173 S.W.3d 918, 923 (JCy.App. 2005).

The record does reveal that Oksana and Dimitri travelled from Warsaw to New York in order for Oksana to marry Carlito. Thus, he assumed responsibility for her undertaking the journey in the first place. Carlito sent her $250.00 for her expenses, which he had very narrowly itemized -- including the visa fee and a train ticket from Kerch, Ukraine, to Warsaw. He included $33.00 for pocket money, which he acknowledged might not be adequate to pay for meals and taxi fare to the airport. On the basis of the record before us, therefore, any shortfall in money on the trip was wholly attributable to the miserliness of Carlito rather than the poor judgment of Oksana.

Carlito also argues that the court erred in awarding Oksana a lump sum maintenance payment of $20,000.00. KRS 403.200 addresses maintenance as follows:

(1) In a, proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Carlito believes that the award was erroneous because of the short duration (seventeen months) of the marriage (KRS 403.200(2) (d}) and because Oksana is young, intelligent, educated, able-bodied, and, therefore, able to support herself

(KRS 403.200(1) C(b).

In concluding that long-term maintenance was not appropriate, the court made findings similar to Carlito's contentions, explaining, however, that:

[Oksana] would not be in this country if not for [Carlito], and [Carlito] signed a document whereby he agreed to support [Oksana] so she would not be a burden on the taxpayers of this country. In fact, it appears that [Oksana] has already received some government assistance. As mentioned above, [Oksana] has adequate housing and has sufficient personal property to provide for herself and her child. [Oksana], however, does not have a car and she needs a car to enable her to transport her child and to enable her to be more readily employable.

On these grounds, the court ordered the lump sum maintenance payment in order for Oksana to obtain reliable transportation. Carlito insists that the court misapplied the law to the facts –in particular, ICRS 403.200(2) (f), which requires the court to consider the ability of the spouse from whom the maintenance is sought to meet his needs. Carlito points out that there was no testimony given regarding whether he would be able to pay maintenance while meeting his own financial burdens.

The trial court found that Carlito had a gross monthly income of $23,000.00 as a result of his medical practice; that during his relationship with Oksana.1 his yearly income was more than $250. 000.00; that he owned two homes in Florida (one of which he sold during the marriage); and that he owned or had owned a town house in New York City. The court found that his real property had a value of more than $500,000.00.

The findings of the court regarding Carlito's financial status are supported by substantial evidence. Thus, it was not necessary for the court to make a separate, explicit finding that Carlito could meet his own financial needs while paying the lump sum maintenance. The statute directs the court to consider the relevant statutory factors. KRS 403.200 (2). The trial court did not err in awarding Oksana maintenance that would assist her in becoming self-sufficient, a. figure that equaled less than one-month's gross salary for Carlito. There is no evidence in the record that payment of this sum would create any financial hardship for Carlito.

We affirm the Findings of Fact, the Conclusions of Law, and the Decree of Dissolution of Marriage.

ALL CONCUR.

BRIEF FOR APPELLANT: BRIEF FOR APPELLEE:
Marcus E. Fannort Lisa A. Beran
Hyden, Kentucky Frankfort, Kentucky

COMMONWEALTH OF KENTUCKY
27th JUDICIAL CIRCUIT
LAUREL CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 03-CI-00418

IN RE:THE MARRIAGE OF CARLITO AXIBAL AND OKSANA AXIBAL and THE CARE, CUSTODY AND SUPPORT OF ONE (1) MINOR CHILD OF:

CARLITO AXIBAL **PETITIONER**

vs. **ORDER**

OKSANA AXIBAL **RESPONDENT**

This matter came before the Court on Friday, January 14, 2005, pursuant to the Petitioner's motion to alter, Amend or Vacate its Findings of Fact, Conclusions of Law and Decree previously entered in this action. The Court having heard arguments of counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED the Petitioner's motion is OVERRULED, except as follows:

1) the Decree is Amended on Page 17, Paragraph No. 4, to reflect that it is the Petitioner who shall maintain health insurance on the minor child and shall be responsible for all the child's un-reimbursed medical expenses; and

2) the Decree is Amended on Page 17, Paragraph No. 5, to reflect that it is the Petitioner who shall pay a Jump sum of $20,000.00 to the Respondent within 30 days of the order.

This 20th day of Januaiy, 2005.

Roderick Messer, Judge
RODERICK MESSER, JUDGE
LAUREL CIRCUIT COURT DIV. II

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COMMONWEALTH OF KENTUCKY
27th JUDICIAL CIRCUIT
LAUREL CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 03-CI-00418

IN RE: THE MARRIAGE OF CARLITO AXIBAL AND OKSANA AXIBAL and THE CARE, CUSTODY AND.SUPPQRT OF ONE (1) MINOR CHILD OF:

CARLITO AXIBAL PETITIONER

vs.

OKSANA AXIBAL RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF LAW and DECREE OF DISSOLUTION OF MARRIAGE

This case is before the Court on exceptions to the recommendation of the Domestic Relations Commissioner (hereinafter DRC). The Court has, reviewed the evidence presented in this case, including the testimony of the witnesses and the .exhibits introduced into evidence, as well as the Decree of Dissolution of Marriage and Findings of Fact and Conclusions of Law recommended by the DRC on July 1, 2004.

This case was heard on the merits by the DRC on May 12 and June 9, 2004. Both parties were present and were represented by counsel. The final hearing consumed some 25 hours over two days before the DRC.

Both the Petitioner and Respondent testified at the hearing, as did Debbie Angel, Shane Goggins, Jimmy King, CD. Gentry, Rick Jackson, Anna Wilhoit, Peggy Phillips,

Monalynn Axibal, Estenieta M. Thomas, Tracy Sizemore, Cindy Hall, Demetrio Borja, Luisa Miller, Thomas Mechas and Divva Joshi.

Due to the extent and nature of the objections of the Respondent to the proposed decree, the court has watched all 25 hours of videotape of the hearing and has reviewed all written depositions and exhibits that were introduced in this case.

The Court has prepared its own Findings of Fact, Conclusions of Law, and Decree.

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter of this action and the parties.
2. The marriage between the parties is irretrievably broken.
3. Neither party has requested a reconciliation conference, nor has the Court ordered one.
4. Neither party is in the military service.
5. The Petitioner, Carlito Axibal is fifty-four years old; his birth date is March 12, 1950; he resides at 122 Pinewood Court, London, Laurel County, Kentucky, and was a resident of this state for more than 180 days before he filed this action.
6. The Petitioner is employed as an emergency room physician at the Manchester Memorial Hospital, in Manchester, Kentucky, and is a citizen of the United States. Petitioner has a gross income of $23,000.00 per month.
7. The Respondent, Oksana Axibal, is twenty-nine years

old; her birth date is March 28, 1978; she resides at 90 McBee Street, Apt. #22, Mt. Vernon, Rockcastle County, Kentucky; is not employed, is not a citizen of the United States, and is in the United States on a visa.

8. The parties first resided in Lee County, Florida, and married in that county on November 17, 2001, where their marriage is recorded.

9. At the time of the marriage, the Respondent was the mother of Dimitri Makarova, her four-year-old son, who came to the United States with her.

10. At the time of the marriage, Petitioner was the adoptive father of at least two adult children who were the children of his deceased brother. The Petitioner adopted the children about ten years ago.

11. The parties separated on or about May 5, 2003, and have remained separate and apart since that date

12. One minor child, Giovanni Axibal, whose date of birth is July 4, 2002, was born to the parties. The child has lived with the parties since birth.

13. Neither the Petitioner nor the Respondent has participated as a party, witness, or in any other capacity in any litigation concerning the custody of Giovanni Axibal in this or any other state.

14. The Petitioner and Respondent know of no other person not a party to these proceedings who has physical custody of their minor child or who claims to have custody or visitation rights with respect to their child.

15. The parties met through a dating service When the Petitioner traveled to the Ukraine. Their courtship was brief, to say the least, and the Respondent was shortly on her way to the United States. The Respondent entered the United States on a fiancé visa.

16. A review of e-mails introduced into the record clearly indicates that the Respondent was primarily interested in manying the Petitioner in order to provide a home for her son, Dimitri, and to obtain a better standard of living for she and her son. The Respondent encouraged the Petitioner to adopt her son, Dimitri, and for a period of time mislead the Petitioner as to the status of Dimitri's natural father. At times, the Respondent spoke of her plans to divorce the Petitioner and to obtain substantial amounts of money from the Petitioner. The Respondent also spoke of obtaining United States citizenship by virtue of her marriage to the Petitioner.

17. On the other hand, the Petitioner clearly went to the Ukraine with the goal of finding a wife that he could control, The record contains emails which reflect the extent that he directed the Respondent in her actions. The Respondent's trip to the United States and the emails related to that trip are a perfect example of the manner in which the Petitioner controlled the Respondent.

18. The Petitioner insisted on a prenuptial agreement. The Petitioner had rejected an earlier fiancé and caused her to return to the Ukraine when she would not sign a prenuptial agreement. The Court has set aside the prenuptial agreement.

19. The Petitioner is much older than the Respondent. The Petitioner had a gross income of over $250,000.00 a year during his relationship with Respondent. The Respondent had no income after she left the Ukraine. The Petitioner was a United States citizen, the Respondent was not. The Petitioner had a car and a drivers license, the

Respondent had neither and did not know how to drive. The Petitioner spoke English sufficiently to work full-time as a medical doctor, the Respondent spoke little English when she first arrived in this country.

20. The Petitioner owned two homes in Florida and owned or had owned a town house in New York City. Apparently, the Petitioner sold one of his Florida homes during the marriage and, in fact, signed a deed listing him as a single person even though he was married to the Respondent. His real property had a value of well over $500,000.00. The Respondent did not own any real property.

21. The Petitioner has been less than truthful with this Court. At or about the time the Petitioner met the Respondent he still owned a townhouse or condo in New York City. The Petitioner claimed that he did not know who was buying the New York City property~and that he did not know the purchase priée for the property. The Petitioner also claimed to know little about the details of the sale of a home he owned in Florida. The Petitioner, claimed his gross monthly income was $13,900.00 a month. In fact, his income was $23,000.00 per month. The Petitioner could not recall his relationship with a prior fiancé from the Ukraine until he was asked about the relationship several times. The Petitioner also said little about a prior marriage and the fact that he had adopted two children of a deceased brother who came to live with him after the death of their father.

22. The children adopted by the Petitioner, a teenage boy and girl, came to live with the Petitioner,' in Florida,

in 1992 .or 1993. When the girl became pregnant while in high school, the Petitioner sent her to California to live with an aunt. The Petitioner also sent the boy back to the Philippines to live with relatives after the boy got in trouble with the authorities in Florida. The Petitioner had no contact with the children after they left his home for a period of about ten years until this litigation began.

23. When the Petitioner was asked about the children several months ago he claimed to not know their whereabouts. The Respondent, through her attorneys, however, was able to locate the children. The children indicated to the Respondent and her attorneys that they would offer testimony about the Petitioner's parenting that would be hannful to the Petitidner. When the Petitioner heard of this, the Petitioner set up a meeting with the children in Florida, at his home. Only the daughter, Monalynn Axibal, later showed up for her deposition which was taken in North Carolina, where she now lives. The Petitioner traveled to North Carolina for the deposition.

24. During the time the parties lived togther, all major decisions were made by the Petitioner. For reasons never fully explained, the Petitioner had a second home built in Florida, only to move to Laurel County, Kentucky, when that home was completed.

25. When the Respondent became pregnant, in Florida, she did not receive regular prenatal care. This situation continued when the parties moved to Kentucky.

26. The Petitioner did schedule time off during the week

that the baby was due. However, the baby did not arrive that week. When the parties went to their doctor, Dr. Thomas Mechas, the Petitioner asked that the baby be delivered on July 4. Dr. Mechas told the Petitioner that he would not be working that day and it was agreed that the baby would be delivered on July 3. The parties were instructed to be at the hospital early on the morning of July 3. By the Petitioner's own admission, he did not follow the doctor's orders. Instead, he showed up at the hospital with the Respondent at about 4:00 p.m. The Petitioner said he did this because he thought Dr. Mechas would be busy all day. The Petitioner did not even call Dr. Mechas or the hospital to say he was not coming. On July 4, the Petitioner only took off until twelve noon. Since his son was not born until later that afternoon, he was not present for his son's birth. Two weeks after his son was born, the Petitioner left his son, the Respondent, and Dimitri in Kentucky while he traveled to Florida for at least a week. The Petitioner claimed that he needed to go to Florida to arrange~ for furniture to be moved to Kentucky.

27. In April, 2003, Petitioner was seen by at least two disinterested parties at Walmart, in Corbin, Kentucky, repeatedly twisting the ear of Dimitri MaKarova as punishment. The two men were shocked by the Petitioner's actions. After a complaint was filed, the Cabinet for Families and Children determined that the Petitioner's actions constituted child abuse. The Petitioner did not deny that he twisted the child's ear. Instead, he claimed that his actions were not as severe as was claimed by the witnesses. Petitioner also claimed that Respondent

had allowed the child to become lost in the store and that was the real issue. The Respondent denied the Petitioner's claim and there remains considerable doubt as to what exactly happened in Walmart until the time the witnesses saw the Petitioner twist the ear of Dimitri. There is, however, no doubt that the Petitioner severely twisted Dimitri's ear. The Petitioner also admitted that he told Respondent, in front of witnesses, that she was going to have to choose between him and her son, Dimitri, and that the Petitioner was going to have Dimitri sent back to the Ukraine. Based on the statements of the witnesses and the Petitioner's own testimony, the Court finds the Petitioner physically abused Dimitri in April, 2003,

CHILD CUSTODY

28. KRS 403.270 sets out the factors the Court is to consider in deciding the custody of a child. These factors are not exclusive. The Court is to give equal consideration to both parties and is to consider all relevant factors.

27. In this case, both parents seek sole custody of the child and the child is too young to express his wishes; the child has, had significant interaction with both parties; however, it appears that the Respondent has been the primary caretaker of the child. The Petitioner has worked fifty to sixty hours a week and has delegated much of the child care responsibility to Estenieta M. Thomas, who he says is his cousin and who has lived in his home both in Florida and in London, Kentucky. It appears that the child had adjusted well to friends and acquaintances of both

parties.

29. The child has a strong relationship with his half-brother, Dimitri.

30. As addressed above, both parties have other children. The Petitioner has two adult children who he adopted as teenagers and who he sent to live with other persons after they have lived with him for only a couple of years. After the Petitioner sent the children away, he had no contact with them, even claiming that he did not know their whereabouts.

31. On the other hand, the Respondent has always had custody of her son, Dimitri. Although the Court might question many of the things that the Respondent has done, there is no doubt she has loved and provided for her son at all times.

32. While the Petitioner has some health problems, they do not appear to be so severe that they are likely to affect his ability to parent the child. The Respondent's health is excellent.

33. The Court finds that the Petitioner has committed an act of domestic violence as defined by KRS 403.720, in that the Petitioner inflicted a physical injury on Dimitri, in Walmart, in April, 2003. In making a determination under 403.270(3) as to whether the domestic violence has affected the child in question, Giovanni, the Court notes that Giovanni was present when the abuse occurred but that Giovanni was very young and was not directly affected by the abuse. On the other hand, in Krug v. Krug, 647 S.W.2d 790 (Ky., 1983), the Court made it clear that even though

neglect or abuse has not yet affected a child the Court can decide that an adverse impact would occur if permitted to continue. A judge then is not required to wait until a child has been hurt before he can give consideration to the conduct causing the injury. Notwithstanding the lack of credibility of the Respondent at times and her motive to lie, the Court finds by a preponderance of the evidence presented in this case that the Petitioner has been physical abusive to Dimitri on more than one occasion. It is likely that the Petitioner would continue such abuse and that the child of the parties would also be a victim and thereby be adversely affected.

34. Based on the evidence presented, the Court finds that it is in the best interest of the minor child that the Respondent be awarded sole custody of Giovanni Axibal, the minor child of the parties.

35. The Court finds that the child's permanent residence shall not be removed from Laurel, Rockcastle, Madison or Fayette County, Kentucky, without further order of the Court.

36. The Petitioner shall receive visitation with the child as per the Laurel Circuit Court Visitation Guidelines. A copy of the visitation guidelines is attached hereto and incorporated herein. The timesharing and custody arrangements set forth shall become effective upon entry of this Decree.

37. Based on the evidence presented, the Petitioner has income of at least $23,000.00 per month. The Respondent is unemployed. However, the Court will attribute income in the amount of $1,000.00 per

month to the Respondent, This amount is somewhat greater than what the Respondent would earn if she worked 40 hours per week at the minimum wage. Given the Respondent's education, it is reasonable to believe that she can earn somewhat more than the minimum wage. The combined income of the parties is considerably greater than the highest income set out in the Kentucky Child Support Guidelines. Based on KRS 403.21 1(3)(e), the Court finds that $2,000.00 per month is an amount that, while it will not allow the child to live at a standard that Petitioner can maintain, is sufficient to adequately provide for the child's needs, including food, clothing, shelter, child care, and transportation. IT IS THEREFORE ORDERED that Petitioner pay child support until the child's eighteenth birthday or until he completes the schoolyear in which he reaches the age of 18, in the amount of $2,000.00 per month, payable by the 1St day of each month, beginning December 1, 2004.

38. The Petitioner is ordered to maintain health insurance on the child andbe responsible for all medical bills that are not covered by insurance.

39. The Petitioner and Respondent shall agree upon a public place in. Mt. Vernon where the Respondent presently resides, where the parties can exchange the child for visitation. In the event the Respondent moves to Madison, Fayette or Laurel County, the parties shall agree upon a public place in an appropriate county to exchange the child.

40. The Petitioner shall be allowed to claim the child as his dependent for tax purposes every year as long as he fulfills his child support obligation.

DIVISION OF PROPERTY

41. From the evidence, the Court finds the parties accumulated the following marital property: a recreational vehicle with equity of $3,342.00; various items of personal property valued at $8,180.48; a bank account with Cumberland Valley National Bank of $104.00; the marital home at 122 Pinewood Court, London, Kentucky, with at agreed equity of $1,707.25.

42. The marital equity to be divided then is $13,333.73. The Respondent is awarded $10,000.00 and the Petitioner is awarded $3,333.73. The Petitioner shall pay to the Respondent the sum of $10,000.00 within thirty (30) days of the entry of the decree for her interest in the marital property. The Petitioner shall retain possession of all marital property listed above and shall be solely responsible for any and all debt owed on the property.

43. The Court finds that all personal property of the Respondent has been removed from the marital residence and that each party shall retain all personal property now in his or her possession.

44. The Court finds that there are bank accounts, IRAs and SEPs that are subject to divisions All such accounts are awarded to the Petitioner. The Court notes that the accounts predate the marriage and that there was little if any increase in the value during the 17 months the parties lived as husband and wife. Furthermore, the Respondent made no contribution to the account;

45. The Court finds all other personal property disclosed by the parties is non-marital property. In particular, a diamond necklace and bracelet given by the Petitioner to the Respondent is found to be non-marital property. Any debt owed on the jewelry shall be the sole responsibility of the Petitioner.

46. The Court finds that real estate owned by the Petitioner in Florida and New York is non-marital property. The Courts fmds that there were improvements made on the property at 8815 Shannandoah Run, Tampa Florida. However, there is insufficient proof in the record as to the value of the improvements and the contribution, if any, by the Respondent to any increase in value.

MAINTENANCE

47. KRS 403.200 provides that a court may award maintenance only if a party cannot provide for his reasonable needs and cannot support himself through appropriate employment, or is the custodian of a child and there are conditions present which make it appropriate that the custodian not work outside the home, In the case before the Court, the Respondent has no income. She is well educated, but is not a citizen of this country.. The Respondent now speaks adequate English to be employable. The Respondent's child is young, but she has indicated that she wants him to be in daycare so he can play with other children, and that she intends to find employment.

48. The Respondent now has adequate housing, but there

is no money coming into her home other than child support paid by the Petitioner. The Respondent has adequate education and training to obtain some employment.

49. The Respondent is not living at a standard that is anywhere close to the standard maintained during the marriage; however, the marriage was very brief, in that the parties separated about seventeen months, after they married.

50. The Respondent is young and healthy.

51. The Petitioner has the ability to meet his needs while paying maintenance.

52. Under the circumstances before the court, long-term maintenance is not appropriate. The parties were less than truthful with each other when they married and the marriage was very brief However, the Respondent would not be in this country if not for the Petitioner, and the Petitioner signed a document whereby he agreed to support the Respondent so she would not be a burden on the taxpayers of this country. In fact, it appears that Respondent has already received some government assistance.

53. As mentioned above, the Respondent has adequate housing and has sufficient personal property to provide for herself and her child. The Respondent, however, does not have a car and she needs a car to enable her to transport her child and to enable her to be more readily employable. IT IS THEREFORE THE ORDER OF THE COURT that the Petitioner pay to the Respondent a one time lump sum payment

of Twenty Thousand ($20,000.00) Dollars for maintenance so she can obtain reliable transportation.

DECREE OF DISSOLUTION OF MARRIAGE

IT IS FURTHER ORDERED AND ADJUDGED as follows:

1. The marriage between the parties is dissolved and each of the parties is restored to all the rights and privileges of an unmarried person.
2. The marital property and debts of the parties are divided as set out in the Findings of Fact.
3. The. Petitioner shall pay child support in the amount of $2,000.00 per month, until the child reaches his 1 8th birthday or completes the year of school he is enrolled in when he turns 18.
4. The Respondent shall maintain health insurance on the minor child and shall be responsible for all of the child's un-reimbursed medical expenses.
5. The Respondent shall pay to the petitioner one lump sum maintenance payment of $20,000.000, payable within thirty (30) days of this order.
6. The Respondent's maiden name of Makarova is restored to her.
7. This is a final and appealable order.

BE IT SO ORDERED this 29th day of November, 2004.

RODERICK MESSER, JUDGE
LAUREL CIRCUIT COURT DIV. II

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